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No. 88-413

In The

Supreme Court of the United States

October Term, 1988

RAYMOND L. BOVINO,

Appellant,

v.

MIDDLESEX COUNTY BOARD
OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. §1257(2), because the directives issued by Appellant's supervisor were not state statutes.

2. Whether a public entity may properly limit an employee's expression of his personal views in the workplace, so as not to be a violation of his First Amendment constitutional rights.

3. Whether the oral directives issued by Appellant's supervisor were sufficiently clear and explicit, so as not to violate an employee's First Amendment rights on grounds of overbreadth, vagueness, or improper motivation.

4. Whether the state court properly reviewed the record below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

MOTION TO DISMISS 1

VERBATIM CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 7

I. THE COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(2) BECAUSE THE DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE NOT STATE STATUTES 7

II. A PUBLIC ENTITY MAY PROPERLY LIMIT AN EMPLOYEE'S EXPRESSION OF PERSONAL VIEWS IN THE WORKPLACE, SO AS NOT TO VIOLATE THE EMPLOYEE'S FIRST AMENDMENT RIGHTS 9

III. THE ORAL DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE SUFFICIENTLY CLEAR, SO AS NOT TO VIOLATE AN EMPLOYEE'S FIRST AMENDMENT RIGHTS ON GROUNDS OF OVERBREADTH, VAGUENESS, OR IMPROPER MOTIVATION 12

TABLE OF CONTENTS–Continued

Page

IV. THE STATE COURT PROPERLY REVIEWED THE RECORD BELOW 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Airport Comm'rs v. Jews for Jesus, Inc. 482 U.S. ___, 96 L. Ed 2d 500 (1987) 12

Arnett v. Kennedy, 416 U.S. 134 (1974), reh. den 417 U.S. 977 9

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 14

Connick v. Myers, 461 U.S. 138 (1983)..... 9, 11, 14

CSC v. National Association of Letter Carriers, 413 U.S. 548 (1973) 13

Czurlanis v. Albanese, 721 F. 2d 98 (3d Cir 1983)..... 10

Gooding v. Wilson, 405 U.S. 518 (1972)..... 12

Hamilton v. Regents of University of California, 293 U.S. 245 (1934) 8

Johnson v. Lincoln Univ. of Com., 776 F. 2d 443 (3d Cir. 1985) 10

Lewis v. New Orleans, 415 U.S. 130 (1974)..... 12

Overbreadth-First Amendment, 45 L. Ed 2d 725, §1(a) 12

Pickering v. Board of Education, 391 U.S. 563 (1968) . 9, 11

Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *certif. den.* 419 U.S. 1057 (1974) 10

Williams v. Bruffy, 96 U.S. 176 (1877) 8

TABLE OF AUTHORITIES–Continued

Page

STATUTES

28 U.S.C. §1257(2) 1, 7, 8, 9, 14

TEXTS

Black's Law Dictionary, 1264 (5th Ed. 1979) 8

Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) 8

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Order and Decision of the Court below on the grounds of lack of jurisdiction and/or that the questions presented are so unsubstantial as not to need further argument.

If the Court regards this appeal as a writ of certiorari, Appellee requests the writ of certiorari be denied because the cases set forth in this motion are controlling and the questions presented herein are unsubstantial.

VERBATIM CITATIONS TO OPINIONS BELOW

The text of the Opinions, Orders and Judgments below are unreported and are contained in the Appendices attached to the Jurisdictional Statement filed by Appellant, at pp. 1a through 24a.

STATEMENT OF JURISDICTION

The cases cited by the Appellant for the proposition that the directives issued herein were "state statutes" under 28 U.S.C. §1257(2) are inapposite, leaving the Court without jurisdiction to hear this matter as a direct appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellee concurs with Appellant that this appeal involves the First Amendment of the United States

Constitution. Appellee argues herein that no "state statute" was involved.

STATEMENT OF THE CASE AND FACTS

On December 27, 1985, J.M. ("client") came to the offices of the Middlesex County Board of Social Services ("the Board"), seeking an extension of her Medicaid benefits. She was seen by Raymond L. Bovino ("Bovino"), an income maintenance worker employed by the Board.[1] He stated that the client was not eligible for extended benefits at this time. Bovino wanted to speak with Deborah Chambers ("Chambers"), his acting supervisor, to see if there were any possible way to extend benefits.

In the meeting amongst J.M., Bovino and Chambers, Chambers explained that J.M. was not eligible for further assistance. When Bovino commented that the only way J.M. would be eligible for Medicaid was if she were pregnant, the client revealed she was pregnant.

Chambers asked Bovino to leave the interview booth so she could privately discuss J.M.'s intentions regarding the pregnancy. Once he left, she asked if J.M. wished to continue the pregnancy or terminate the pregnancy. J.M. informed Chambers that she wanted to terminate the pregnancy. Chambers left the booth briefly to discuss with the intake supervisor the procedure for obtaining

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[1] Bovino had previously seen J.M. regarding welfare benefits when J.M. sought continuaton of a prior pregnancy and medical care for that child.

Medicaid. Chambers told Bovino to complete any income maintenance business while she checked the procedure.

When Chambers returned, she heard Bovino advising J.M. that she could have the baby and give it up for adoption rather than having an abortion. Chambers interrupted the conversation, told J.M. that she was eligible for Medicaid and told J.M. that a Board social worker would assist her to make the appropriate arrangements. Chambers told Bovino that he was to finish any income maintenance business and that he was not to preach to the client. Chambers then left to find a Board social worker.

Despite Chamber's direct instructions, Bovino continued to advise the client that abortion was wrong even though that was what she wanted. Bovino went on to say that it was not J.M.'s baby and J.M. had no right to decide if she wanted an abortion or not.

Chambers had contacted Joan Israel ("Israel"), a Board social worker, who was also the family planning specialist, to see J.M.[2] After explaining the client's circumstances, Chambers went to find out J.M.'s actual termination date of benefits, while Israel went to see the client.

When Chambers returned to the booth, she found Bovino and Israel arguing over who was to see the client.

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[2] It should be noted that Bovino's job function was to determine eligibility for various public assistance programs. He was not employed as a social worker, whose job description specifies the type of family planning J.M. requested.

Bovino told Israel that he was not finished with the interview. Chambers advised Bovino that his job as an income maintenance worker was completed because the problem should now be handled by the social worker. Bovino insisted he had something else to discuss with the client, but left the booth when Chambers restated her position.

J.M. told Israel that she wanted the abortion. Israel told J.M. that if that was what she wanted, then that is what she should do: it was J.M.'s decision to make.

Upon returning to their office, Chambers again spoke to Bovino and told him that it was not his responsibility to attempt to change a client's mind. Bovino replied that it was his responsibility to advise a client and that he would continue to try and convince a client that she should not commit murder. Chambers advised Bovino that his responsibilities did not extend to advising or explaining to a client what options or social services existed for either continuing or terminating a pregnancy. Bovino then stated that he would continue to "try and prevent the client from committing murder" and he would "make sure that Chambers would not find out about it." In response, Chambers told Bovino that agency regulations stated that he could either be put on corrective action or that he could be fired if he violated her instructions.[3]

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[3] It should be noted that Bovino received a copy of a memo dated May 18, 1978, issued by the Board regarding confidentiality and conflict of interest between a Board employee and a client.

Shortly after the above discussion, Bovino approached the client in the Board's waiting room. He asked J.M. if an appointment had been scheduled for the abortion. J.M. said it had, but it was cancelled because she wanted the father, F.M., to go with her. J.M. told Bovino she had to call Joan Israel to set up another appointment. Bovino advised J.M. not to call Israel until he could talk to her. Allegedly, J.M. indicated a desire to receive further information.

The next day (December 28, 1985), Bovino and a friend, Ursula Spencer, went to J.M.'s house unannounced. J.M. was surprised to see Bovino and did not really expect him to show up. Bovino gave J.M. an envelope containing a cassette tape, some literature and a letter. Bovino told Spencer that J.M. was pregnant and was thinking of having an abortion, that her parents did not know of the pregnancy and that he was going to show her "the right way" by putting the baby up for adoption.

On December 30, 1985, J.M. came to the Board's offices to discuss the possibility of placing the child from her first pregnancy up for adoption. Bovino advised her that she should keep the child and "thank God you have the child." He stated "that if you don't want a kid, then you should not go to bed with anyone, but now that you're having it, you should go through with the pregnancy." He also told J.M. that it was not her right to decide whether she wanted an abortion or not, that it was God's baby, and not J.M.'s decision.

Bovino then offered J.M. a ride home. She agreed because it was too late to take the bus. Bovino stopped at his parent's house first where J.M. had dinner. Bovino

talked about going to the Alpha Pregnancy Center where counselors were going to show J.M. what was right. J.M. did not wish to go there at that time, and asked Bovino to bring her home.

On January 2, 1986, Bovino had further contact with J.M. when she told him that her parents wanted her out of the house. Bovino took time off from work to take J.M. to the Alpha Pregnancy Center, where she received counseling and an offer to stay in Pennsylvania during her pregnancy. Bovino then dropped J.M. off to meet F.M., the reputed father.

On January 6, 1986, J.M. called Bovino because she wanted to leave home. Bovino arranged for J.M. to stay with his friend Ursula Spencer. On the second night at Spencer's home, J.M. told Bovino that she had an appointment with Joan Israel the next day at the Board offices. Bovino advised her not to see Joan Israel because she would just set up another appointment to have the abortion. In the morning, he again told J.M. it was not a good idea to see Israel and left for the Board office without her.

J.M. spent the next day at the home of Bovino's parents. Bovino learned that the reputed father had come looking for him at the Board offices, attempting to locate J.M. Bovino took J.M. to the New Brunswick and Old Bridge Police Departments to file complaints against F.M. J.M. attempted to contact F.M. Bovino hurried to bring J.M. to Pennsylvania and get her away from her home and F.M. Bovino had arranged for J.M. to stay in Pennsylvania and give birth to the child. J.M. wanted to stop at her home, but Bovino refused. J.M. told Bovino that F.M.

was coming to her house and she wanted to see him, that she did not want to go to Pennsylvania, and that she did not want to have the child. She requested Bovino to bring her home, but he replied that J.M. would have to open the door and jump out of the moving car. J.M. repeatedly asked to be brought back home, but Bovino did not stop until he reached the Alpha Pregnancy Center. Again, Bovino refused to bring her home. She rejected the plans made for her by Bovino and called F.M. who picked her up and brought her home. At this point, Bovino ceased contact with J.M. J.M. ultimately aborted the child and suffered unnecessary emotional pain and hospitalization as a result.

The extent to which Bovino had gone to block the planned abortion was brought to the attention of the Board by the client and her boyfriend, F.M. Disciplinary charges were brought against Bovino. Following a disciplinary hearing, Bovino was suspended for 20 days: 10 days with pay and 10 days without pay. (Appellant's App. 1a-2a). The appeals from that disciplinary action bring the matter before the Court today.

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(2) BECAUSE THE DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE NOT STATE STATUTES

28 U.S.C. §1257(2) provides for direct appeal to the United States Supreme Court when "the question of the validity of a *statute* of any state" is challenged under the

Constitution of the United States, and the highest state court reviewing the statute upholds it.

Appellant contends that the directives of Bovino's supervisor were "state statutes" within the meaning of 28 U.S.C. §1257(2).

A statute is defined as "an act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government." *Black's Law Dictionary*, 1264 (5th Ed. 1979)

The reference in §1257(2) to a "statute of any state" has been defined many times to include every action to which a state gives the force of law. *Williams v. Bruffy*, 96 U.S. 176, 183 (1877). The meaning of "statute of any state" is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power. *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934). The definition also encompasses state constitutional provisions, statewide initiative propositions, municipal ordinances and by-laws, and orders of state commissioners and governing bodies issued in the exercise of their delegated legislative authority. Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 110.

There was no law, statute or regulation that Appellant can refer to: merely the directives of his supervisor to perform his job within its guidelines and not to influence a client's choice. That action does not rise to the level of "state statute" within the meaning of §1257(2).

Therefore, the Appellee moves the Court to dismiss this appeal for lack of jurisdiction under 28 U.S.C. §1257(2).

II. A PUBLIC ENTITY MAY PROPERLY LIMIT AN EMPLOYEE'S EXPRESSION OF PERSONAL VIEWS IN THE WORKPLACE, SO AS NOT TO VIOLATE THE EMPLOYEE'S FIRST AMENDMENT RIGHTS

The Supreme Court has recognized the right of public employers to regulate the speech of their employees under appropriate circumstances. *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Education,* 391 U.S. 563 (1968).

These cases have held that the employee's First Amendment rights must be weighed against the disruptive effect of the activities on the Government's ability to provide services. As the Court stated in *Connick,* the balancing of interest to determine whether dismissal of a public employee for statements made by the employee requires " . . . full consideration of the Government's interest in the effective and efficient fulfillment of its responsibilities to the public . . . " *Connick v. Myers, supra,* 461 U.S. at 150. The government as employer must have wide direction and control over the management of its personnel and internal affairs. *Arnett v. Kennedy,* 416 U.S. 134 (1974), reh. den. 417 U.S. 977.

An employee cannot indiscriminately invoke his First Amendment freedom as a bar to disciplinary action when his utterance becomes disruptive of his own work and injurious to the efficiency of his employment unit. *Arnett v. Kennedy, supra. Pickering v. Board of Ed., supra.* The

Constitutional right of a public employee may not override the basic obligation of an employee to an employer. The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of government. *Pietrunti v. Brick Tp. Bd. of Ed.*, 128 N.J. Super. 149, 166 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *certif. den.* 419 U.S. 1057 (1974).

The facts of the case at bar remove it from the domain of that which the First Amendment seeks to protect. The conduct of Appellant goes far beyond the lawful dissemination of information or the addressing of matters of public concern. Cf. *Johnson v. Lincoln Univ. of Com.*, 776 F. 2d 443 (3d Cir. 1985); *Czurlanis v. Albanese*, 721 F. 2d 98 (3d Cir. 1983).

The Board of Social Services is charged with the orderly and efficient administration of various public assistance programs, which include providing the types of services sought by J.M. It is not difficult to perceive the disastrous effect upon Board operations which would result from the unrestrained coercion or pressuring of clients by their individual caseworkers based upon each particular employee's political or moral philosophy. Specifically, the Board offers services for either continuing or terminating a pregnancy. The case of J.M. points this out dramatically: J.M. was given appropriate services for the continuation and medical care for her first pregnancy and was given appropriate services when she requested help for termination of her second pregnancy.

The Appellant argues that the sole basis for the disciplinary action taken against Bovino was his alleged violation of the "no preaching" order issued to him by Chambers on December 27, 1985. That is not the case at bar.

The totality of Bovino's actions[4] served to disrupt the operation of the Board. While Appellant's motivation is not questioned, it is his methods that cannot logically be tolerated if the Board is to function. The key to the issue at hand is the disruption of the public employer's ability to provide services. The client came to the Board seeking assistance and was put through an ordeal by Appellant with total disregard for the client's rights to confidentiality and the provision of those services. All this was clearly a "disruption" as contemplated in *Pickering* and *Connick* which is not, and should not be, shielded by the First Amendment.

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[4] Bovino's disruptive actions, once Chambers issued her original directive, included: (1) continuing discussions within J.M. in the Board office advocating adoption, (2) arguing with Israel over who was to see the client, requiring Chambers to intercede, (3) telling Chambers that he would continue to advise the client and Chambers having to inform him of possible disciplinary action, (4) advising J.M. in the Board's waiting room not to call Israel, (5) using information obtained at the Board office to contact J.M. at home, (6) advising J.M. in the Board office on December 30, 1985 not to have the abortion, (7) advising J.M. not to keep her appointment with Israel, (8) taking days off from work to meet with J.M. and taking her to the Alpha Pregnancy Center, and (9) refusing to reveal to the Board where J.M. was when it received a complaint from F.M.

Since the cases cited above are controlling, and leave no room for controversy, the question presented is unsubstantial and should be cause to grant Appellee's motion.

III. THE ORAL DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE SUFFICIENTLY CLEAR, SO AS NOT TO VIOLATE AN EMPLOYEE'S FIRST AMENDMENT RIGHTS ON GROUNDS OF OVERBREADTH, VAGUENESS, OR IMPROPER MOTIVATION

For the Court to find that a person's First Amendment rights have been infringed upon on grounds of overbreadth or vagueness, whether upon its face or applied, the Court must invalidate some legislation. Legislation would include federal and state statutes and ordinances, as well as executive and administrative regulations. See *Overbreadth-First Amendment*, 45 L. Ed 2d 725, 728, Section 1(a); Cf. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, 415 U.S. 130 (1974); See also Point I of Appellee's brief at pp. 7-8.

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a *statute* on its face, but only if the overbreadth is substantial. *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. ___, 96 L. Ed 2d 500, 507 (1987). (emph. ours).

The directives given to the Appellant were sufficiently clear to put him on notice that he should not impose his personal convictions upon a client.

Furthermore, the cases cited in Appellant's brief are inapposite. Each of those cases refers to an ordinance, regulation or statute. In the case at bar, Appellant's

supervisor was simply telling Bovino, in common language, to do his job within its guidelines and not to attempt to influence a client's choice. See also Point I of Appellee's Brief at pp. 7-8.

The directives were sufficiently clear, not vague, for any ordinary person to understand. Cf. *CSC v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

Appellant further argues that the motivation of the Board was improper. There is nothing within the record below to suggest that the Board has a "pro-abortion bias" other than Mr. Bovino's highly subjective opinion. (Appellant's Brief at 19) In fact, Chambers testified that J.M. was a Board client who received appropriate services for the continuation of her first pregnancy and care of her child when such help was requested and was offered appropriate services when she requested help for termination of her second pregnancy. The Board offers the necessary financial and social services to a client totally dependent on that client's choice.

For the reasons set forth above, the directives were neither overbroad, vague nor improper, and as such, did not violate Appellant's constitutional rights.

IV. THE STATE COURTS SATISFIED THEIR CONSTITUTIONAL DUTY OF INDEPENDENT REVIEW

A full and complete brief along with copies of transcripts of the hearings was submitted by Appellant to the Appellate Division of the Superior Court of New Jersey. Appellee submitted its brief. The Appellate Division held that "the findings and conclusions of the ALJ are supported by substantial credible evidence in this record. . . .

We affirm substantially for the reasons expressed by Judge Murphy in his comprehensive and lucid decision." (Appellant's App. 23a).

Judge Murphy's decision is replete with his discussion of constitutional law, as well as his framing of the constitutional issue in the case (Appellant's App. 11a; 13a-17a).

The petition for certification to the New Jersey Supreme Court set forth Appellant's constitutional arguments, as well as the decisions below. The Board submitted its Appellate Division brief to the New Jersey Supreme Court. The New Jersey Supreme Court denied Appellant's petition for certification (Appellant's App. 24a).

The appellate courts satisfied their duty to make an independent review of the constitutional issues in this case. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Connick v. Myers, supra*, 461 U.S. at 150 (n. 10).

Thus, there was no constitutional error by the courts below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the within appeal should be dismissed or, in the alternative, that the Order, Judgment and Decision below be affirmed, due to the lack of jurisdiction under 28 U.S.C. §1257(2) or that the questions presented have been adjudicated and present no substantial controversy.

If this Court determines that this appeal be regarded as a petition for a writ of certiorari, it is respectfully submitted that the cases set forth above are controlling, and the questions presented to the Court are so unsubstantial as to cause the Court to deny certiorari in this case.

Respectfully submitted,

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